(8)

No. 97-6146

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

ANGEL JAIME MONGE, *Petitioner*,

v.

STATE of CALIFORNIA, *Respondent*.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF CALIFORNIA

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

"Does the Double Jeopardy Clause apply to noncapital sentencing proceedings that have the hallmarks of a trial on guilt or innocence?" JA[1] 132.

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1. All "JA" notations are to the Joint Appendix.

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OPINION BELOW

In an opinion filed August 27, 1997, the Supreme Court of California reversed the judgment of the Court of Appeal of California. The intermediate appellate court had held Respondent could not relitigate the truthfulness of a prior felony conviction allegation. The Supreme Court of California held the federal prohibition against double jeopardy does not apply to a noncapital sentencing proceeding in California. *People v. Monge*, 16 Cal.4th 826, 831-45, 66 Cal. Rptr. 2d 853, 941 P.2d 1121 (1997); JA 40, 46-47, 49.

CONSTITUTIONS, STATUTES OR REGULATIONS

Petitioner relies on the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, as incorporated into the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

In an information filed by the District Attorney of Los Angeles County, Petitioner was charged with three offenses: adult using a minor to sell marijuana in violation of California Health and Safety Code section 11361(a) (count I), sale or transportation of marijuana in violation of California Health and Safety Code section 11360(a) (count II), and possession of marijuana for sale in violation of California Health and Safety Code section 11359 (count III). As to all counts, it was alleged Petitioner had a prior serious or violent felony conviction within the meaning of California's "Three Strikes Law" set forth in California Penal Code sections 667(b)-(i) (legislative version) and 1170.12(a)-(e) (initiative version), and had served a prior prison term within the meaning of California Penal Code section 667.5(b). Petitioner pled not guilty and denied all special allegations.

A jury found Petitioner guilty as charged on the substantive offenses. After a bifurcated proceeding on the prior conviction allegations, the court found the allegations true (JA 9-16, 18) and sentenced Petitioner to a total term of imprisonment of 11 years: 5 years on count I, doubled to 10 years under the Three Strikes Law, plus 1 year for the prior prison term enhancement. JA 50-52.

The California Court of Appeal affirmed the conviction, but reversed on insufficiency grounds the true finding on the "strike" allegation. The California Court of Appeal also held the Double Jeopardy Clause precluded the prosecution from relitigating the strike allegation. The Court of Appeal remanded for resentencing. JA 41-45, 52-53.

The California Supreme Court reversed, holding the People could relitigate the strike allegation because

the Double Jeopardy Clause does not apply to noncapital sentencing proceedings. JA 49, 53, 74-75, 78.[2]

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2. On January 7, 1998, the strike allegation was relitigated. At this hearing the court admitted into evidence the preliminary hearing transcript from Petitioner's prior case. The transcript showed Petitioner had personally inflicted great bodily injury and had used a dangerous or a deadly weapon during his commission of assault in 1992. The court again found the strike allegation true.

SUMMARY OF ARGUMENT

The Fifth Amendment of the United States Constitution provides that "(n)o person shall ... be subject for the same offence to be twice put in jeopardy of life or limb ...." Petitioner claims this constitutional guaranty, known as the Double Jeopardy Clause, applies to noncapital sentencing proceedings. In *Bullington v. Missouri*, 451 U.S. 430 (1981), a 5-to-4 decision, the Court held the Clause applies to a capital penalty phase which has the hallmarks of a trial on guilt or innocence. Petitioner asks the Court to extend *Bullington* to noncapital sentencing proceedings. The request should be denied, for several reasons, and the judgment of the Supreme Court of California should be affirmed. First, the Double Jeopardy Clause should not be enlarged to apply to successive noncapital sentencing proceedings. In any event, noncapital sentencing in California does not have the hallmarks of *Bullington*. If application of *Bullington*'s hallmarks test compels the conclusion that double jeopardy extends to noncapital sentencing proceedings, the Court should reconsider *Bullington*. For these reasons, the Court should affirm the decision of the Supreme Court of California.

IV.

THE DOUBLE JEOPARDY CLAUSE SHOULD NOT BE ENLARGED TO APPLY TO SUCCESSIVE NONCAPITAL SENTENCING PROCEEDINGS

This Court has never held, and should not now hold, that the Double Jeopardy Clause applies to noncapital sentencing proceedings. On the contrary, the Court has previously declined to extend the Double Jeopardy Clause to noncapital sentencing proceedings in

United States v. DiFrancesco, 449 U.S. 117 (1980), and it reserved the issue in *Lockhart v. Nelson*, 488 U.S. 33, 37 n.6 (1988), before confirming that expansion of the Double Jeopardy Clause to noncapital cases would constitute a "new rule." *Caspari v. Bohlen*, 510 U.S. 383 (1994). *Caspari* makes clear that a new rule extending *Bullington*, 451 U.S. 430, to noncapital sentencing proceedings is not dictated by precedent, would break new ground, and would impose a new burden on the states and the federal government. *Caspari*, 510 U.S. at 390.[3]

Recidivist laws such as California's Three Strike Law, which punish habitual offenders more severely than first offenders, "have a long tradition in this country that dates back to colonial times." *Parke v. Raley*, 506 U.S. 20, 27 (1992).[4] Such laws are now in effect "in all 50 States," and the federal government has enacted such laws. *Id.* at 26-27. "States have a valid interest in deterring and segregating habitual criminals." *Id.* at 27.

Significantly, the Court has repeatedly upheld recidivism statutes challenged under the Double Jeopardy Clause. *Raley*, 506 U.S. at 27. The Court has rejected due process challenges to "a variety of state procedures for implementing otherwise valid recidivism statutes." *Id.* "'Tolerance for a spectrum of state procedures dealing with [recidivism] is especially appropriate' given the high rate of recidivism and the diversity of approaches that States have developed for addressing it." *Id.* at 28. The Court has also said "a charge under a recidivism statute

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3. In *Graham v. Collins*, 506 U.S. 461 (1993), the Court said a rule is "new" if it breaks new ground, imposes a new obligation on the states or the federal government, or was not dictated by precedent. *Graham*, 506 U.S. at 467.

4. *Raley* held due process permits a state to impose a burden of production on a recidivist defendant who attacks the validity of a prior conviction under *Boykin v. Alabama*, 395 U.S. 238 (1969). *Raley*, 506 U.S. at 34.

does not state a separate offense, but goes to punishment only." *Id.* at 27. Having upheld recidivist laws under double jeopardy attack, *Raley*, 506 U.S. at 27, having rejected due process attacks on "a variety of state procedures" for implementing recidivism laws, *id.* at 27, and having held a recidivist charge "does not state a separate offense[,]" *id.*, the Court should not now hold that a proceeding to prove a prior conviction (necessary to trigger an alternate sentencing scheme) is the equivalent of a proceeding to prove an offense such that a lack of proof bars a successive attempt to prove the prior conviction. Instead, the type of proceeding at issue here is akin to a proceeding to prove a prior conviction for purposes of sentence enhancement.

Caspari also specifically confirms that the reasoning of *Bullington* and *Arizona* v. *Rumsey*, 467 U.S. 203 (1984), "was based largely on the unique circumstances of a capital sentencing proceeding." 510 U.S. at 392. In *Bullington*, a bare majority held that Missouri's capital sentencing proceedings, which it characterized as "unique," 451 U.S. at 441 n.15, so resemble a criminal trial that they are subject to the Double Jeopardy Clause. The procedural differences in capital sentencing proceedings constituted the "underlying rationale" of extending the Double Jeopardy Clause to capital sentencing proceedings. 451 U.S. at 441; see also *Gregg* v. *Georgia*, 428 U.S. 153, 191 (1976). Insofar as *Bullington's* holding can be attributed to the "death is different" rationale, obviously that rationale has no application in a noncapital sentencing proceeding. *Barefoot* v. *Estelle*, 463 U.S. 880, 913 (1983) (Marshall, J., dissenting) ("Time and again the Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case. *See, e.g., Bullington* v. *Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed. 2d 270 (1981)"). *Bullington* thus only created a narrow exception in death penalty cases regarding application of the Double

Jeopardy Clause. That exception should not be enlarged so as to swallow the rule.[5]

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5. States and federal courts are divided as to whether the Double Jeopardy Clause applies to noncapital sentencing proceedings analogous to the one here. Respondent's position is shared by a variety of courts that have found the federal double jeopardy clause did not apply in analogous proceedings. (*See, e.g., Carpenter v. Chapleau*, 72 F.3d 1259, 1274 (6th Cir. 1996) ("We do not believe the Double Jeopardy Clause is implicated in [a persistent felony offender] proceeding."); *Denton v. Duckworth*, 873 F.2d 144, 148 (7th Cir. 1989) ("We agree . . . that the habitual offender statute, which does not create a separate offense or require consideration of the underlying facts on the substantive charge, is distinguishable from the statute at issue in *Bullington*, and thus double jeopardy does not attach."); *Linam v. Griffin*, 685 F.2d 369, 376 (10th Cir. 1982) (The habitual criminal proceeding "is an inquiry as to whether or not the man standing before the court is the same person who was previously convicted as charged. The jury answers yes or no in accordance with the evidence. This is not the kind of adjudication that is referred to in the fifth amendment."); *Durham v. State*, 464 N.E.2d 321, 324 (Ind. 1984) ("The habitual offender status . . . is a continuing status any time the defendant commits a further crime and a jury's determination that a defendant is not a habitual offender during a particular trial is not an 'acquittal' of that defendant's status as a habitual offender."); *State v. Cobb*, 875 S.W.2d 533, 536 (Mo. 1994) ("The constitutional double jeopardy prohibition does not speak to sentencing except in capital cases."); *State v. Aragon*, 116 N.M. 267, 271 [861 P.2d 948, 952] (N.M. 1993) ("Because our habitual criminal proceedings are not 'prosecutions' of an 'offense' and sentencing does not imply guilt or innocence of any greater crime, . . . double jeopardy does not attach."); *cf. Wilmer v. Johnson*, 30 F.3d 451, 456 (3d Cir. 1994) ("[I]n *Bullington*, a capital case, the Court carved out an exception to the general rule that the Double Jeopardy Clause does not apply in the sentencing context."); *U.S. v. Rodriguez-Gonzalez*, 899 F.2d 177, 181 (2d Cir. 1990) ("Reliance on . . . *Bullington* is inapposite . . . since . . . [*Bullington*] arose in the unique context of capital sentencing."); *People v. Levin*, 623 N.E.2d 317, 325 (Ill. 1993) ("We conclude that the separate hearing procedure under our [Habitual Criminal] Act bears insufficient formalities of a trial to render that factor analogous to the separate hearing procedure in *Bullington* and to this defendant's trial on the issue of guilt."); *People*

First, however, Respondent will demonstrate that the Double Jeopardy Clause has no application in this case at all, because proof of a prior conviction -- like an enhancement -- is not an "offense" as the latter term is defined in the Double Jeopardy Clause.

The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. *See Chaffin v. Stynchcombe*, 412 U.S. 17, 23 (1973); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). The Clause was designed to protect an innocent defendant from the anxiety and insecurity of having to face repeated attempts by a prosecutor to obtain a conviction. This case, however, does not involve an offense because "a charge under a recidivism statute does not state a separate offense[.]" *Raley*, 506 U.S. at 27; *see also Almendarez-Torres v. United States*, ___ U.S. ___ [1998 W.L. 126904] (March 24, 1998).

It is similarly settled that an enhancement is not an offense. *See United States* v. *Watts*, 117 S.Ct. 633, 636 (1997) ("sentencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction"); *Nichols v. United States*, 511 U.S. 738, 747-48 (1994) (sentencer may consider "a defendant's past criminal behavior, even if no conviction resulted from that behavior"), noting *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986) (states may treat "visible possession of a firearm" as a sentencing

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v. Sailor, 65 N.Y.2d 224, 231-36 [480 N.E.2d 701, 708] (N.Y. 1985) ("[T]here is a qualitative and quantitative difference between imposition of the death penalty [at issue in *Bullington*] and sentencing as a persistent or second felony offender. . . ."); *but see Perkins v. State*, 542 N.E.2d 549, 551-52 (Ind. 1989) (overruling *Durham v. State, supra*, 464 N.E.2d 321).

consideration rather than an element of a particular offense); *Schiro v. Farley*, 510 U.S. 222, 230-31 (1994) ("[W]e have also upheld the use of prior convictions to enhance sentences for subsequent convictions, even though this means a defendant must, in a certain sense, relitigate in a sentencing proceeding conduct for which he was previously tried."). Therefore, *Bullington* did not address whether the penalty hearing constitutes the trial of an offense.

Similarly, a lack of proof of prior offender status is not an "acquittal" of such status. For that reason, the defendant in *Caspari* could not successfully argue that the State's failure to prove his recidivist status at his first sentencing hearing operated as an acquittal of that status. 510 U.S. at 391. *Caspari* reiterated that a sentence does not have the qualities of constitutional finality that attend an acquittal. *Id*. This Court should reject the claim that a failure of proof in this context represents an acquittal, just as the Court has rejected the contention that a lack of proof regarding an aggravating circumstance in a capital case necessarily constitutes an acquittal of that circumstance for double jeopardy purposes. *Poland v. Arizona*, 476 U.S. 147, 155-56 (1986).

Nor does this case, or noncapital sentencing proceedings generally, involve the interests applicable to the innocent defendant. Whatever one thinks of the justifications that have been offered to extend double jeopardy protection to capital sentencing proceedings, they plainly do not warrant extending those protections to ordinary noncapital sentencing proceedings. A prior offender has the status of being a prior offender and that status is unaffected by a statute requiring the government to prove the status. The prior convictions either do or do not exist, and the defendant's status is unaffected by the government's ability to prove that status.

In a trial of a prior conviction allegation, the trial determines only a question of the defendant's continuing

status, irrespective of the current offense, and in California the prosecution may reallege and retry that status in as many successive cases as it is relevant, even if a prior jury has rejected the allegation, because the jury's rejection of the allegation does not acquit the defendant of his prior conviction status. *People v. Monge*, 16 Cal.4th at 839, 941 P.2d at 1130, JA 65. "A defendant cannot be 'acquitted' of that status any more than he can be 'acquitted' of being a certain age or sex or any other inherent fact." *Durham v. State*, 464 N.E.2d at 324.

The California Supreme Court, writing in Petitioner's case, found that a sentencing proceeding under California Penal Code section 1025 is unlike the sentencing proceeding in *Bullington* and did not implicate the interests protected by the Double Jeopardy Clause. Consequently, the Court concluded *Bullington's* "hallmarks" analysis did not apply.

First, the California Supreme Court contrasted the trial-like procedures that regulate imposition of the death penalty with a noncapital sentencing hearing. A prior conviction trial in California does not require the trier of fact to determine the existence of a broad range of aggravating and mitigating circumstances regarding the defendant's character, nor does it then require a finding that aggravation outweighs mitigation, or a weighing of those circumstances. Nor does a California noncapital sentencing trial allow the trier of fact to reject a longer sentence if the sentence is supported by the evidence. "Considering the breadth and subjectivity of the factual determinations at issue in *Bullington*, the failure of proof at issue in that case was more like an acquittal at the guilt phase of a criminal trial than is the failure of proof at issue here." *People v. Monge*, 16 Cal.4th at 837, 941 P.2d at 1129, JA 62.

Second, a trial of a prior conviction does not represent the sentencing "ordeal" described in *Bullington* and *DiFrancesco*, 449 U.S. at 136 ("repeated attempts to

convict [subject] . . . defendant to embarrassment, expense, anxiety, and insecurity, and the possibility that he may be found guilty even though innocent."). *Bullington* described the anxiety and insecurity faced by a capital defendant during sentencing proceedings as "equivalent to that faced by a defendant at the guilt phase of a criminal trial." 451 U.S. at 445.

An enhancement proceeding, however, is not a prosecution of an additional criminal offense carrying the stigma associated with a criminal charge; "rather it is merely a determination, for purposes of punishment, of the defendant's *status*, which like age or gender, is readily determinable from the public record." *People v. Monge*, 16 Cal.4th at 838, 941 P.2d at 1129, JA 63 (emphasis in original); *see Caspari*, 510 U.S. at 396 ("Persistent-offender status is a fact objectively ascertainable on the basis of readily available evidence. Either a defendant has the requisite number of prior convictions, or he does not."); *DiFrancesco*, 449 U.S. at 136-37 (a sentence is determined "in large part on the basis of information . . . developed outside the courtroom").

When, as in Petitioner's case, the court has bifurcated the prior conviction issue, the defendant begins the prior conviction trial having already suffered the embarrassment of the present conviction. Accordingly, the marginal increase in embarrassment attributable to the prior conviction trial is not comparable to the embarrassment of an unproved criminal charge. While the outcome of a trial of prior conviction allegations is undoubtedly *important* to a defendant -- potentially increasing a short prison term to a life term -- the level of embarrassment, expense, and anxiety involved is not equivalent to that faced at the guilt phase of the trial. This lessened financial and emotional burden exists even when the prior conviction trial may substantially increase the length of the sentence. *People v. Monge*, 16 Cal.4th at 838, 941 P.2d at 1129, JA 63.

Clearly, any alleged increase in anxiety, expense and embarrassment caused by an enhancement proceeding, even one leading to a long prison term under California's Three Strike Law, Cal. Penal Code § 667(e)(2), is not comparable to the ordeal faced by one subject to a penalty of death. *See Bullington*, 451 U.S. at 448 (Powell, J., dissenting) (lack of "documentation in the record" to support the majority's claim that "the expense, ordeal, and anxiety at a resentencing in a capital murder case are as great as would accompany a redetermination of guilt or innocence"); *Rummel v. Estelle*, 445 U.S. 263, 272 (1980). And the defendant's interest in finality in circumstances short of an acquittal is clearly outweighed by the societal interest in assuring that the punishment fits the offender, which in this case is a convicted recidivist. *See Williams* v. *New York*, 337 U.S. 241 (1949).

The California Supreme Court also found a third distinguishing feature between capital and noncapital sentencing proceedings -- the essential nature of the jury's inquiry. The sentence determination in a death penalty case depends largely on the facts of the defendant's capital crime, overlapping with the guilt phase of the trial, and additionally includes a general appraisal of the defendant's character. A trial of a prior conviction, in contrast, is typically divorced from the defendant's current crime, and the evidence is unrelated. *People v. Monge*, 16 Cal.4th at 839, 941 P.2d at 1130, JA 65.

For these reasons, the Double Jeopardy Clause is inapplicable to noncapital sentencing proceedings.

V.

NONCAPITAL SENTENCING IN CALIFORNIA DOES NOT HAVE THE *BULLINGTON* HALLMARKS

Even assuming the applicability of the Double Jeopardy Clause, that Clause does not prohibit readjudication of the prior conviction allegation in this case because California's sentence enhancement proceedings do not contain all the hallmarks of a trial on guilt or innocence. *Bullington* therefore should not be extended to noncapital sentencing proceedings.[6]

The Double Jeopardy Clause should not be extended to noncapital sentencing proceedings because noncapital sentencing proceedings provide for a broad range of punishment. *Bullington* held that the Double Jeopardy Clause is applicable only when the sentencer is without discretion to exercise its authority and cannot select from amongst a wide range of punishment. 451 U.S. at 444. In *Bullington*, this Court noted that the jury in capital punishment proceedings was "not given unbounded discretion to select an appropriate punishment from a wide range authorized by statute." 451 U.S. at 438.

Before and after *Bullington* this Court has declined to extend the Double Jeopardy Clause to sentencing proceedings which authorize a wide range of punishment. When the sentencer has a wide range of punishment from which to choose, the Double Jeopardy Clause does not foreclose the issuance of a higher

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6. *State* v. *Cobb*, 875 S.W.2d at 535 (Mo. 1994) (Supreme Court of Missouri, where *Bullington* originated, declined to extend *Bullington*); *People* v. *Levin*, 623 N.E.2d at 322 (Supreme Court of Illinois declined to extend *Bullington*). The Supreme Court of California, of course, refused to extend *Bullington* here. *People* v. *Monge*, 16 Cal.4th at 829, 941 P.2d at 1123, JA 49.

sentence upon resentencing. *North Carolina v. Pearce*, 395 U.S. at 719-21. This holding was extended to sentencing determinations by a jury in *Chaffin v. Stynchcombe*, 412 U.S. at 17. Likewise, this Court declined to extend the Double Jeopardy Clause to federal enhancement proceedings in *United States v. DiFrancesco*, 449 U.S. 117.

The Missouri law at issue in *Bullington* had only two sentencing choices for the jury in the case of a capital murderer (death or life without the possibility of probation or parole for 50 years). *Bullington*, 451 U.S. at 432. Under the Missouri death penalty law, the sentencing jury did not have "unbounded discretion," but rather chose "between two alternatives." *Id.* at 438. California, in contrast, allows a wide range of sentencing choices for a noncapital defendant. In Petitioner's case, for instance, the judge had *ten* sentencing choices (3, 4, 5, 6, 7, 8, 10, 11, 14, or 15 years) under California's statute.

Thus, unlike the jury in *Bullington*, the judge in the present case could have sentenced Petitioner to a broad range of punishment.[7] The judge was not limited to imposing either life imprisonment or capital punishment. Because the judge could have sentenced Petitioner to a term within a range of punishment, the reasoning of *Bullington* is inapplicable to noncapital proceedings to prove prior convictions. The lack of sentencing discretion, a rationale for the Court's application of the Double Jeopardy Clause to capital sentencing proceedings, is not present in this noncapital case.

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7. Petitioner confuses the issue by merging the fact-finder's limited role in noncapital sentencing with the discretion potentially exercised by a judge, subsequent to the factual determination, when the judge is selecting a sentence. PBM 12-13. *See* Argument II, *post*. A noncapital sentencing fact-finder decides only whether the proof is sufficient. If so, that does not end the inquiry, as the sentence has yet to be imposed.

California's Three Strike Law describes a "strike," in part, as any offense defined in California Penal Code section 1192.7(c).[8] A trial court in California has discretion under California Penal Code section 1385(a) to disregard, on the court's own motion, any prior conviction allegations at any time during the proceedings "in furtherance of justice," and the exercise of that discretion is reviewable only for abuse. *People v. Superior Court (Romero)*, 13 Cal.4th 497, 504, 529-31, 917 P.2d 628, 647-49 (1996). "We have held that the power to dismiss an action [under § 1385] includes the lesser power to strike factual allegations relevant to sentencing, such as the allegation that a defendant has prior felony convictions." *Romero*, 13 Cal.4th at 504, 917 P.2d at 630; *see also People v. Olin*, 13 Cal.3d 937, 946, 533 P.2d 193 (1975) ("It is also settled that it is within the trial court's power under [§ 1385] to strike or dismiss a proceeding as to a prior conviction for the purpose of sentencing"), *citing People v. Tenorio*, 3 Cal.3d 89, 94, 473 P.2d 993 (1970). The Three Strike Law under which Petitioner was sentenced also provides that:

> [t]he prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice pursuant to section 1385, or if there is insufficient evidence to prove the prior conviction. If upon the satisfaction of the court that there is insufficient evidence to

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8. California Penal Code section 1192.7(c)(8) says a serious felony is "any other felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice[,]" and California Penal Code section 1192.7(c)(23) says a serious felony is "any felony in which the defendant personally used a dangerous or deadly weapon[.]" Hence, if the State could prove Petitioner personally inflicted great bodily injury and/or used a dangerous or deadly weapon when convicted of assault in 1992 (JA 5), his assault conviction would be a strike. JA 27-28, 33-34.

> prove the prior felony conviction, the court may dismiss or strike the allegation.

Cal. Penal Code §§ 667(f)(2), 1170.12(d)(2).[9] Thus, unlike the adjudicator of guilt or innocence, the California sentencing court has more than two choices when imposing sentence, a fact which the Court deemed of great importance to its decisions in both *Bullington* and *DiFrancesco*. *See Bullington*, 451 U.S. at 438, 440.

Moreover, California law requires that, in determining whether to dismiss or strike an allegation under section 1385, the sentencing court must "consider both the constitutional rights of the defendant, and the interests of society represented by the prosecution." *People v. Superior Court (Romero)*, 13 Cal.4th at 530, 917 P.2d at 648.

In the specific context of the Three Strike Law, the California Supreme Court has also stated that a court deciding whether to strike or dismiss a prior felony conviction

> must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had presently not committed one or more felonies and/or had not previously been convicted of one or more serious and/or violent felonies.

People v. Williams, 17 Cal.4th 148, 161, 948 P.2d 429, 437 (1998).

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9. The California Supreme Court has interpreted these provisions to permit the sentencing court to strike or dismiss a prior conviction either on the court's own motion or on that of the prosecutor. *People v. Superior Court (Romero)*, 13 Cal.4th at 504, 917 P.2d at 630.

Significantly, the considerations which inform the discretionary striking or dismissal of a prior conviction under section 1385 substantially mirror the "life, health, habits, conduct, and mental or moral propensities" said by this Court to be proper sentencing considerations in *Williams v. New York*, 337 U.S. at 245. The sentencing court's freedom to consider such factors again suggests that the sentencing proceedings at issue here are more like a traditional sentencing and less like a trial on guilt or innocence.

Here, of the three crimes the jury found Petitioner guilty of committing, the court selected count I, adult using a minor to sell or transport marijuana, as the base count. JA 7. The punishment range for that crime is 3, 5, or 7 years. Cal. Health & Safety Code § 11361(a).[10]

Under California's State Three Strike Law, following a true finding on a strike allegation in a second-strike case (i.e., a case where the defendant has a current conviction for any felony and one prior conviction for any serious or violent felony), the court must double the term

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10. The court was required to use count I as the base count due to California Penal Code section 654, *see* JA 20, 22, which provides,

> An act or omission that is punishable in different ways by different provisions of the law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.

Cal. Penal Code § 654(a); *see People v. Latimer*, 5 Cal.4th 1203, 1207-12, 858 P.2d 611 (1993); *see, e.g., People v. Hendrix*, 16 Cal.4th 508, 511-15, 66 Cal.Rptr.2d 431, 941 P.2d 64 (1997). The sentencing range for count II (sale or transportation of marijuana) is 2, 3 or 4 years. Cal. Health & Safety Code § 11360(a). The range for count III (possession of marijuana for sale) is "imprisonment in the state prison[,]" (Cal. Health & Safety Code § 11359) which means it is 16 months, 2 or 3 years. Cal. Penal Code § 18. Since the longest potential term is count I, that count had to be the base count in this case.

selected for the current base count. Cal. Penal Code §§ 667(e)(1) (legislative version), 1170.12(c)(1) (initiative version); *see Romero*, 13 Cal.4th at 504-06, 917 P.2d at 630-31 (discusses enactment of both versions). As noted, however, the court is later free to dismiss the strike in furtherance of justice under *Romero*. Hence, if the instant sentencer chose to use the strike to double count I, the choice of sentence would be 6 years (a 3-year low term doubled), 10 years (a 5-year middle term double), or 14 years (a 7-year upper term doubled). Since Petitioner had served a prior prison term, California Penal Code section 667.5(b) required that a 1-year enhancement be imposed. JA 19-20, 40, 50, 52. The sentencing court, however, retained discretion to dismiss the 1-year enhancement. *See* Cal. Penal Code §§ 1170.1(d), 1385(a).

Here, the court imposed a 5-year middle term for count I, doubled to 10 years under the Three Strike Law, and added a 1-year prior prison term enhancement. JA 19-20. Had the court chosen to *dismiss* the strike and prior prison term allegations, the choice of sentence was 3, 5 and 7 years. Had a *low* term been imposed with a dismissal of the strike and prior prison term allegations, Petitioner could have received a *total* term of 3 years.

The above shows the sentencer here had *ten* sentencing choices (3, 4, 5,6, 7, 8, 10, 11, 14 or 15 years). Hence, California's noncapital sentencing process does not share *Bullington's* two-choice hallmark.

Second, California's sentencing scheme permits the government to appeal from a sentencing court's determination that it will not consider a prior conviction in imposing sentence. *See* Cal. Penal Code § 1238(a)(10). *See also People v. Williams*, 17 Cal.4th at 157-159, 948 P.2d at 429. Because the Petitioner "is charged with knowledge of the statute and its appeal provisions, [he] has no expectation of finality in his sentence until the appeal is concluded." *DiFrancesco*, 449 U.S. at 136. Where one reason for declining to consider a prior conviction in

sentencing is the court's determination that "there is insufficient evidence to prove the prior felony conviction," Cal. Penal Code §§ 667(f)(2), 1170.12(d)(2), and the government is permitted to appeal from the determination, the defendant is on notice of the fact that a finding of insufficient evidence will not necessarily end the possibility he may be subjected to a recidivist sentencing scheme. *See DiFrancesco*, 449 U.S. at 137.

Third, California's Three Strike Law requires the government to "plead and prove *each* prior felony conviction except as provided in paragraph (2)."[11] Cal. Penal Code §§ 667(f)(1), 1170.12(d)(1) (emphasis added). By essentially removing the prosecutor's discretion to choose the prior convictions to be used to enhance a defendant's sentence, the statute renders the sentence enhancement proceeding less like a trial, and more like an administrative review of a defendant's prior criminal record.

Fourth, under California law, if the state chooses to present the sentencing court with evidence of a prior conviction other than a certified copy of the conviction, the state is only permitted to present evidence from the record of the prior conviction. *See People v. Monge*, 16 Cal.4th at 839, 941 P.2d at 1129, *citing People v. Guerrero*, 44 Cal.3d 343, 355, 748 P.2d 1150, 1157 (1988). Thus, there is no risk that the sentence enhancement proceeding will become a second trial, at which the government marshals new evidence of which a defendant is unaware, and presents it for the first time. *See Bullington*, 451 U.S. at 440 (distinguishing the federal procedures at issue in *DiFrancesco* because "appellate review of a sentence

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11. "Paragraph (2)" refers to sections 667(f)(2) and 1170.12(d)(2), set forth above, which permit the prosecutor to move to strike or dismiss certain prior convictions in furtherance of justice or if supported by insufficient evidence.

[proceeded] 'on the record of the sentencing court,'" *quoting* 18 U.S.C. § 3576).

For all of these reasons, California's sentencing proceeding more closely resembles a traditional sentencing proceeding than it does a trial on guilt or innocence. Thus, even if the Court were to hold that the Double Jeopardy Clause applies to noncapital sentencing proceedings which have the hallmarks of a trial on guilt or innocence, double jeopardy would not bar a second proceeding to determine whether the prior conviction is true.

VI.

IF APPLICATION OF *BULLINGTON*'S HALLMARKS TEST COMPELS THE CONCLUSION THAT DOUBLE JEOPARDY EXTENDS TO NONCAPITAL SENTENCING PROCEEDINGS, *BULLINGTON* SHOULD BE RECONSIDERED

If Petitioner is correct, and the hallmarks present here are the equivalent of those identified in *Bullington* such that *Bullington* controls even this noncapital case, that only further illustrates that *Bullington's* extension of double jeopardy protection should be reconsidered and overruled because it is irreconcilable with the plain language of the Fifth Amendment and all previous precedents of this Court.[12/]

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12. The Court has said *stare decisis* has force unless there is a demonstration that an earlier case misinterpreted a constitutional command. *Johnson v. Texas*, 509 U.S. 350, 366-67 (1993); *see Witte v. United States*, 515 U.S. 389, 406, 115 S.Ct. 2199, 2209 (1995) (Scalia, J., concurring in judgment, joined by Thomas, J.) (double jeopardy "is one of those areas in which I believe our jurisprudence is not only wrong but unworkable as well, and so persist in my refusal to give that jurisprudence *stare decisis* effect").

As already noted, the Double Jeopardy Clause by its terms proscribes a second jeopardy "for the same *offence*." U.S. Const. amend. V, italics added. The Clause makes no express reference to sentencing determinations, and, traditionally, this Court has been reluctant to apply the Clause to sentencing determinations.

In *Stroud v. United States*, 251 U.S. 15 (1919), a jury found the defendant guilty of first degree murder "'without capital punishment,'" which was one of its options under the applicable statute. *Id.* at 17, 18. This Court reversed the judgment. A jury on retrial convicted the defendant of first degree murder, but omitted the stipulation against capital punishment, and the trial court sentenced the defendant to death. *Id.* at 17. The Court held that the defendant had not been "placed in second jeopardy" despite the change in his sentence from life imprisonment to death. Specifically, the Court did not consider the verdict of "guilty . . . 'without capital punishment'" as a conviction of a lesser offense. "The fact that the jury may thus mitigate the punishment to imprisonment for life did not render the conviction less than one for first degree murder." *Id.* at 18.

Stroud was reaffirmed in *Pearce*, *supra*, 395 U.S. at 720. In *Pearce*, the Court ruled that the Double Jeopardy Clause did not preclude the court from imposing a longer sentence after retrial. "Long-established constitutional doctrine makes clear that [with the exception of credit for time served] the guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon reconviction." *Id.* at 719.

In *Chaffin v. Stynchcombe*, 412 U.S. at 23-24, the Court again reaffirmed that the Double Jeopardy Clause does not preclude a longer sentence following retrial. Finally, in *United States v. DiFrancesco*, 449 U.S. 117, decided only five months before the Court determined *Bullington*, the Court held that the sentencing scheme at issue did not violate the Double Jeopardy Clause, noting

that "[h]istorically, the pronouncement of sentence has never carried the finality that attaches to an acquittal." *Id.* at 133. Thus, in a variety of contexts, the Court has declined to extend the federal guaranty against double jeopardy to sentencing proceedings.

Bullington represented a complete departure from this approach. Until *Bullington*, this Court had never applied the Double Jeopardy Clause to sentencing decisions after retrial. Although the *Bullington* court may have been inclined to do so because "death is different," that rationale is grounded in the Eighth Amendment principles concerning cruel and unusual punishments, not the Double Jeopardy Clause. This Court's holding in *Bullington* applying the Double Jeopardy Clause to sentencing proceedings is inconsistent with the holdings in *North Carolina v. Pearce*, *supra*, and *United States v. DiFrancesco*, *supra*. Although the Court distinguished these cases because of the "unique" procedures employed during Missouri capital sentencing proceedings, the analytical "difference is immaterial for the purpose of the Double Jeopardy Clause." *Bullington v. Missouri*, 451 U.S. at 448 n.2 (Powell, J., dissenting).

Application of the Double Jeopardy Clause should not depend on the procedural particulars established by each state. An expansion of *Bullington* to include noncapital sentencing proceedings would only prompt states to reconsider the discretionary procedural benefits they now grant to defendants in a noncapital sentencing trial. As the California Supreme Court pointed out in this case, many of the procedural protections that apply in a section 1025 hearing rest on statutory, not federal grounds. And section 1025's grant of a jury trial has been extended to include various elective procedural guaranties. For example, the defendant's state law right to proof beyond a reasonable doubt and the privilege against self-incrimination have arisen out of judicial dictum. *People v. Monge*, 16 Cal.4th at 834, 941 P.2d at

1126, JA 56. By amending these procedures, states would avoid any comparison with *Bullington*, and thereby reduce the procedural rights currently enjoyed by a recidivist defendant. *See e.g.*, *Sandin v. Conner*, 515 U.S. 472, 486, 115 S. Ct. 2293, 2301 (1993) ("We hold that Conner's discipline in segregated confinement did not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest").

Accordingly, *Bullington*'s extension of the Double Jeopardy Clause should be reconsidered.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully asks that the Court affirm the decision of the Supreme Court of California.

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Respectfully submitted,

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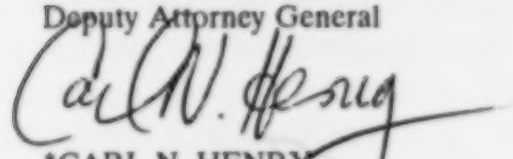

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